

In the December 20, 2010, Award, ALJ Hursh determined (1) claimant's October 17, 2006, accident caused injury in the claimant's neck and shoulder area; (2) the preponderance of the evidence showed claimant did not have permanent functional impairment to the neck and does not have permanent work restrictions regarding the neck; (3) claimant did not prove a permanent injury to the neck or cervical spine; (4) the preponderance of the evidence showed there was a permanent injury to claimant's right

shoulder; and (5) respondent's liability for emergency room treatment was limited to the \$500 allowance for unauthorized medical benefits. ALJ Hursh adopted Dr. P. Brent Koprivica's rating of a 12% functional impairment to the right shoulder and granted claimant permanent disability benefits for that impairment.

Claimant contends the ALJ erred in (1) conditioning a work disability¹ award on proof of functional impairment; (2) concluding claimant's neck and upper back are not permanently impaired; and (3) denying an award for payment of medical expenses associated with emergency room treatment. Claimant requests the Board enter an award for a 64.25% work disability based upon a 28.5% task loss and a 100% wage loss. Claimant also requests the Board order respondent to pay for claimant's emergency room treatment.

Respondent contends the ALJ correctly determined that claimant has failed to prove a whole body functional impairment or work restrictions related to a whole body injury and that the ALJ properly denied work disability benefits. Respondent also asserts that if claimant suffered any injury to her neck, such injury was due to a series of injuries after October 17, 2006, and as such should be litigated in a separate proceeding. Respondent also maintains the ALJ correctly denied payment of the medical bills at issue as they were incurred on an unauthorized basis and no emergency situation existed.

The issues before the Board on this appeal are:

1. The date of accident for claimant's neck injury.
2. The nature and extent of claimant's disability.
3. Respondent's obligation to pay for emergency room treatment that claimant alleges was necessitated by her injury.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

Claimant was employed by respondent in the production department. Respondent builds trophies, plaques, medals and orders custom apparel. On October 17, 2006, claimant was "linking" medals using a machine that linked the medals to the neck ribbons. When claimant lifted a tub of medals (a tub of medals weighed 10 to 15 pounds) and twisted, she felt a pop in her right shoulder area and noticed pain. Following the injury,

¹ A permanent partial disability under K.S.A. 44-510e that is greater than the whole person functional impairment rating.

claimant's right shoulder and right side of the neck caused her problems. Additionally, she experienced numbness in her right hand. When she testified at the August 12, 2010, regular hearing, claimant attributed pain between the shoulder blades, down the arm and up into the neck to her accident at the respondent.

Claimant reported the accident to her supervisor and was provided medical treatment with Dr. Ransom at Ottawa Family Physicians, who took x-rays, prescribed an anti-inflammatory medication and allowed claimant to return to regular duties at work. Claimant received no additional medical treatment until January 2007. Because she continued to experience shoulder/scapular pain, claimant saw her family physician, Dr. Ellen Sinclair, on January 22, 2007, and was referred to Dr. Gregory P. Lynch, an orthopedic surgeon. It appears Dr. Lynch was authorized by respondent to treat claimant.

Dr. Lynch first saw claimant on January 29, 2007, and claimant indicated to him she had pain in her shoulder which also radiated up into her neck and also had radiating symptoms down into her elbow and hand with numbness and tingling in her fingers. Dr. Lynch's impression was that claimant had right shoulder pain and possible cervical radiculopathy. He indicated claimant could return to light duty within restrictions that he imposed.

Initially Dr. Lynch prescribed physical therapy including electrical muscle stimulation, but claimant's condition did not improve. The doctor ordered an MRI of claimant's right shoulder, which was normal, and an MRI of her cervical spine, which revealed no significant abnormalities. Dr. Lynch then had claimant undergo epidural steroid injections. Additionally, Dr. Lynch referred claimant to Dr. Arnold, a neurosurgeon, who indicated claimant's neurological evaluation was normal and did not recommend any treatment. In November 2007, Dr. Lynch injected claimant's right shoulder. In December 2007, Dr. Lynch stated: "I think this is an upper back and neck problem that is a little bit out of my field of expertise at this point. I have recommended today chiropractic care."²

Claimant began seeing Dr. Winters, a chiropractor, on January 17, 2008. He treated claimant's neck and shoulder. Claimant saw the chiropractor numerous times for treatment.

After January 29, 2007, Dr. Lynch placed claimant on light duty. Claimant returned to her same job duties, but was provided assistance to keep within her restrictions. Claimant believes the restrictions were for her right shoulder and not her neck.³ In November 2008, claimant was switched to a new job of assembling pedestal trophies. This required her to use a drill or hand nut wrench to assemble 400 to 500 pedestal trophies per

² Stipulation (Dec. 1, 2010), Ex. A.

³ R.H. Trans. (Aug. 12, 2010) at 46.

day, which she did, using the tools in her right hand. Claimant indicated her jobs of linking medals and assembling pedestal trophies were repetitive in nature.⁴ Claimant was employed by respondent until January 26, 2010, when she received a telephone call from her production supervisor that her services were no longer needed.

Respondent referred claimant to Dr. Chris D. Fevurly, an occupational medicine physician who is board certified in internal medicine and preventive medicine with specialization in occupational medicine, for an independent medical examination. Dr. Fevurly examined claimant on July 28, 2008, and noted claimant complained of pain in the periscapular and upper back areas on the right. Dr. Fevurly indicated there was little to no mention of pain in the neck. The doctor did state claimant occasionally noted pain radiating into the neck. Dr. Fevurly noted in his July 28, 2008, report that claimant had reached maximum medical improvement. In his IME report Dr. Fevurly's assessments included:

1. Regional non-neurogenic right periscapular pain, cause unknown or undetermined.
 - a. Objective evaluation to current date is unremarkable.
 - b. There is no evidence for internal joint derangement of the right shoulder and no evidence for injury to either the cervical or thoracic spine.
 - c. There is no pre-existing history of similar complaints.
 - d. There is no current evidence for either cervical cord impingement or cervical radiculopathy as the source for her current pain.⁵

According to Dr. Fevurly, as no objective findings were identified he could not identify a permanent impairment nor did he recommend any permanent restrictions or limitations. Dr. Fevurly noted claimant had no evidence for central nerve root entrapment, cord impingement, internal derangement of the right shoulder, rotator cuff tear, labral injury or instability in the right shoulder.

Dr. Fevurly testified there were no objective abnormalities upon which to make a determination pursuant to the *AMA Guides*⁶ that claimant had an impairment of function. He indicated claimant had no restrictions and, therefore, suffered no task loss. Upon cross-examination from claimant's counsel, Dr. Fevurly acknowledged a person can have an injury without objective findings and that soft tissue injuries rarely demonstrate objective findings. Dr. Fevurly believed claimant had a soft tissue injury of the shoulder girdle area at the time of the initial injury. Dr. Fevurly acknowledged claimant had chronic, unremitting

⁴ *Id.*, at 42-44.

⁵ Fevurly Depo., Ex. 2.

⁶ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

pain and that claimant indicated the pain adversely affected her day-to-day and work activities. Dr. Fevurly indicated that pain alone, without objective findings, for a regional pain syndrome is not a ratable impairment under the *AMA Guides*.

Claimant's attorney referred claimant to Dr. Edward J. Prostic, a board-certified orthopedic specialist, for an independent medical evaluation which took place on September 17, 2008. Claimant told Dr. Prostic she experienced pain in her right shoulder blade area that ascended to the right side of her neck and went to her shoulder. She also indicated in the mornings she would have stiffness in her neck when she awoke and sometimes would be bothered by looking upward or turning her neck to the right. Dr. Prostic indicated it was "ambiguous" whether claimant's neck complaints were separate from the shoulder or were being referred from the shoulder.⁷

Upon examining claimant, Dr. Prostic noted claimant's cervical spine alignment was satisfactory, her range of motion was normal, nerve root irritability signs were negative, there was no neurological deficit in either arm and testing for thoracic outlet syndrome was negative. Dr. Prostic also noted there was no tenderness in the cervical spine but there was midline tenderness at T6. Dr. Prostic took x-rays of claimant's cervical spine, which revealed no abnormalities. With regard to claimant's right shoulder, Dr. Prostic noted the alignment was satisfactory, crossover sign was negative, there was no significant weakness, no shoulder instability, impingement signs were negative and the biceps anchor appeared intact.⁸ Range of motion testing for forward flexion and abduction resulted in abnormal findings (150 degrees each of out an expected 180 degrees each).

At the time Dr. Prostic saw claimant, he did not rate claimant's impairment. However, on the date of his deposition, Dr. Prostic indicated that at the time he examined claimant, even though she had not reached maximum medical improvement, there was no evidence of a permanent impairment regarding her cervical spine or neck area. The doctor indicated that when he saw claimant there was evidence of permanent impairment to the shoulder. Dr. Prostic also indicated that at the time he examined claimant, he would not have conducted any further testing for rating purposes and he did not impose any temporary or permanent restrictions. Only if claimant was denied or she refused additional treatment would he have given her a modest rating for her neck.⁹

On April 29, 2010, claimant saw Dr. P. Brent Koprivica, a board-certified occupational medicine physician who is also board certified in emergency medicine, for an independent medical evaluation at claimant's attorney's request. Dr. Koprivica's report reflects claimant had subjective persistent right-sided neck pain that radiated from the right

⁷ Prostic Depo. at 9.

⁸ *Id.*, Ex. B.

⁹ *Id.*, at 31-32.

side of the neck down the trapezius to the shoulder as well as extreme pain between her shoulder blades. Claimant related to Dr. Koprivica that she had ongoing pain in the right shoulder, ongoing loss of strength in the right shoulder and had limited ability to reach overhead using her right shoulder.

Dr. Koprivica opined that as a result of the October 17, 2006, injury claimant developed a chronic cervicothoracic strain/sprain injury with the development of chronic neck pain associated with the development of regional myofascial pain with ongoing active trigger points.¹⁰ Dr. Koprivica considered claimant to have a DRE Category II impairment using the *AMA Guides* and assigned claimant a 5% whole person impairment as a result of her chronic cervicothoracic strain/sprain with myofascial pain.¹¹

Dr. Koprivica also diagnosed claimant with an injury to the right shoulder girdle with the development of a chronic impingement syndrome on the right. Dr. Koprivica gave claimant a 12% functional impairment rating to the right shoulder in accordance to the *AMA Guides*.¹²

It was indicated by Dr. Koprivica that claimant's shoulder and neck problems were muscular in nature and she suffered no neurological or orthopedic injury. Claimant suffered from a soft tissue injury which was a sprain or strain to the trapezius and rhombus muscles. Dr. Koprivica placed claimant in DRE Category II because of clinical signs of asymmetrical motion deficits associated with active trigger points.¹³ Dr. Koprivica placed work restrictions upon claimant and indicated she has a 28.5% task loss.

On November 15, 2007, claimant filed an Application for Hearing and indicated she injured her neck, right shoulder and upper back at work on October 17, 2006. An amended Application for Hearing was filed by claimant on October 10, 2008, alleging the same injury date. A second amended Application for Hearing was filed by claimant on September 7, 2010, alleging claimant injured her neck, right shoulder and upper back "Oct. 17, 2006 and according to Continental Western there was a subsequent series of accidents through 1/26/10."¹⁴

Claimant alleges she incurred an injury to her right shoulder and her neck on October 17, 2006, thus making it a non-scheduled injury. Respondent alleges claimant's

¹⁰ Koprivica Depo. at 14 and Ex. 2.

¹¹ *Id.*, at 20.

¹² *Id.*, at 19.

¹³ *Id.*, at 49-50.

¹⁴ Application for Hearing (filed Sept. 7, 2010).

impairment is limited to her right shoulder and that she suffered no permanent disability to her neck or upper back. Respondent also alleges that after October 17, 2006, claimant continued to perform highly repetitive job duties until her last date of employment, and that if she has a permanent disability to her neck it was caused by a repetitive series of injuries commencing after the October 17, 2006, incident and ending on her last date of employment.

The date of accident for claimant's neck injury

At the regular hearing on November 3, 2010, ALJ Hursh addressed the issue of whether claimant's injuries occurred in a single incident on October 17, 2006, as alleged by claimant, or resulted from a repetitive series of microtraumas. ALJ Hursh said:

So I guess, in effect, I'm dismissing the amended application. I don't know if I really have the authority to do that, but I do, I guess, have the authority to handle the case in an efficient manner and I'm not going to take up the series claim here.

I'm going to determine the disability from the October 17 of '06, and that excludes any other carriers except Continental Western, and we'll proceed accordingly. . . .¹⁵

Although the Award indicates the parties stipulated to an accident date of October 17, 2006, respondent did not enter such a stipulation and has consistently maintained claimant's neck injury was a result of repetitive microtraumas after October 17, 2006. In his brief to this Board respondent's counsel alleges that if there is any injury to claimant's neck, such injury is due to a series of repetitive injuries that occurred after October 17, 2006.

This Board finds claimant injured her neck and shoulder as a result of her work-related accident of October 17, 2006, and not as a result of a series of microtraumas as alleged by respondent. Claimant has consistently maintained she injured her shoulder and neck on October 17, 2006. Dr. Prostic indicated "**On or about October 17, 2006** and each and every working day thereafter, Donna K. Thompson has sustained injury to her cervical spine and right upper extremity."¹⁶ (Emphasis added.) Dr. Koprivica opined that claimant, as a direct and proximate result of her October 17, 2006, injury, has a cervicothoracic strain/sprain.

¹⁵ R.H. Trans. (Nov. 3, 2010) at 15.

¹⁶ Prostic Depo., Ex. B.

This issue is clouded by the testimony of claimant and the physicians. At preliminary hearing, claimant testified that the restrictions placed on her by Dr. Lynch on January 29, 2007, were for her shoulder only.¹⁷ She also testified as follows:

Q. (Mr. Burghart) The current problems that you're having with your shoulder, do you attribute those to the October of 2006 incident, or do you attribute those to the work that you've performed since that time?

A. (Claimant) To the October incident.

Q. Are you having any problems with your neck?

A. It hurts, but that's, I think, from the shoulder pulling on the neck.

Q. What area of the neck does it --

A. Down the right side. It's more right through here (indicating).

Q. And it's your belief that neck pain is coming from the shoulder?

A. Yes.¹⁸

At regular hearing, claimant testified concerning her neck as follows:

Q. (Mr. Kolich) And your neck's a problem too; is that right?

A. (Claimant) Yes.

Q. Do you have a recollection of when you first started noticing problems with your neck?

A. No, I don't.¹⁹

When cross-examined by respondent's counsel, claimant testified as follows:

Q.(Mr. Burghart) Let me ask you the same questions in regards to your neck. Do you feel that the work you continued to perform after October 17, 2006, and continuing onwards through the point when you started the trophy job in November 2008, do you feel that that work continued to aggravate, worsen, and/or intensify your neck problems?

¹⁷ P.H. Trans. at 27.

¹⁸ *Id.*, at 25-26.

¹⁹ R.H. Trans. (Aug. 12, 2010) at 14.

A.(Claimant) Yes.²⁰

On January 22, 2007, claimant went to see her family physician, Dr. Sinclair, because she was having problems with her shoulder. Dr. Sinclair referred claimant to Dr. Lynch. On claimant's first visit with Dr. Lynch on January 29, 2007, she complained of pain in her shoulder radiating into her neck. Despite this, claimant acknowledged that when she first saw Dr. Lynch, she believed that her problems were limited to her shoulder.²¹

Dr. Fevurly indicated that merely because something causes an increase in pain does not necessarily mean there's more injury. Thus, although claimant's work activities after October 17, 2006, caused her to have pain, it does not necessarily mean she suffered additional injury to her shoulder or her neck.

Respondent's counsel asked claimant at regular hearing if the work she performed after October 17, 2006, continued to aggravate, worsen or intensify her neck problems. This appears to be an acknowledgment by respondent's attorney that claimant suffered an initial neck injury on October 17, 2006. Given the fact claimant began complaining of neck problems to Dr. Lynch approximately three months after October 17, 2006, and taking into consideration the testimony of the claimant, it is more likely than not that claimant's neck injury stemmed from the incident of October 17, 2006.

The nature and extent of claimant's disability

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.²² "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."²³

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination.²⁴

²⁰ *Id.*, at 48-49.

²¹ *Id.*, at 38.

²² K.S.A. 2006 Supp. 44-501(a).

²³ K.S.A. 2006 Supp. 44-508(g).

²⁴ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212 (1991).

Claimant's counsel relies on *McLaughlin*²⁵ to argue that where a worker suffers a work disability, but no functional disability, proof of functional disability is not a prerequisite for recovery under K.S.A. 44-510e. Claimant's counsel further argues there is no statutory requirement for permanent partial disability to be "permanent." K.S.A. 44-510e(a) states in part, "Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and **which is not covered by the schedule in K.S.A. 44-510d and amendments thereto.**" (Emphasis added.) Claimant's neck injury is a non-scheduled injury, and, thus, K.S.A. 44-510e requires she must be disabled in a manner which is partial in character and permanent in quality.

ALJ Hursh specifically found claimant does not have functional impairment to her neck nor does she have any restrictions caused by any whole body disability. This Board disagrees and believes by the barest of margins claimant has met her burden of proving by a preponderance of the evidence that she has a permanent functional impairment to her neck. Dr. Koprivica opined claimant has a 5% functional impairment for the neck injury under the *AMA Guides*. He and Dr. Fevurly indicated that the *Guides* assigns a permanent impairment under the DRE model only where there are clinical or objective signs of an injury.

Dr. Koprivica opined claimant had clinical signs of injury to her neck, as he indicated claimant showed asymmetric motion deficits in her neck associated with active trigger points. Dr. Fevurly indicated claimant had no motion deficits to her cervical spine and had no ratable impairment. Dr. Fevurly did indicate that the fifth and sixth editions of the *AMA Guides* would accord some impairment for pain without objective findings, but using the required fourth edition, pain alone is not a ratable impairment.

Dr. Prostic portended claimant showed a normal range of motion and had no cervical spine tenderness. He indicated that at the time he saw claimant, even though she had not reached maximum medical improvement, there was no evidence of a permanent impairment regarding claimant's cervical spine. He went on to say that if she got treatment and that treatment did not resolve symptoms from claimant's neck, then she may have had a ratable condition of her neck.²⁶ Finally, Dr. Lisa M. Hermes, whom claimant was referred to by Dr. Lynch, noted in a report dated July 9, 2007, that claimant's active range of motion of the cervical spine revealed slight local discomfort with rotation to the right, but revealed a negative Spurling maneuver.²⁷

The ALJ utilized Dr. Koprivica's impairment rating of claimant's right shoulder and found she has a permanent functional impairment rating of 12% to the right shoulder. Dr.

²⁵ *McLaughlin v. Excel Corp.*, 14 Kan. App. 2d 44, 783 P.2d 348, rev. denied 245 Kan. 784 (1989).

²⁶ Prostic Depo. at 31-32.

²⁷ Stipulation (Dec. 1, 2010), Ex. A.

Prostic stated claimant had evidence of a permanent impairment to claimant's right shoulder but did not give an impairment rating expressed in a percentage.

Only Dr. Fevurly indicated claimant did not have a ratable impairment to her right shoulder. His rationale was that claimant has regional pain in the periscapular area, the cause of which is undetermined and no pathology or impairment has been identified. He did acknowledge claimant has chronic, unremitting right periscapular pain. The preponderance of the evidence supports the finding of the ALJ that claimant suffered a permanent functional impairment rating of 12% to the right shoulder. The Board finds claimant also sustained a 5% whole body functional impairment for her neck injury as opined by Dr. Koprivica.

Dr. Koprivica indicated claimant's right upper extremity impairment rating converts to a 7% impairment rating to the body as a whole. When the 7% impairment rating to the body as a whole for the right upper extremity is combined with the 5% whole body impairment rating given by Dr. Koprivica for claimant's neck injury, claimant has a 12% permanent functional impairment rating to the body as a whole. The Board finds claimant has sustained a 12% whole body functional impairment.

Dr. Koprivica is the only physician who testified claimant has a task loss. Dr. Koprivica indicated claimant has a 28.5% task loss based upon the restrictions he placed upon claimant. The Board finds claimant has a 28.5% task loss.

After claimant was discharged from respondent's employ on January 26, 2010, she worked for Scott Construction Company full time for three weeks in April 2010 at the rate of \$10 per hour, but she was only paid one week's wages. Despite looking for work, claimant has not worked anywhere else. The Board finds claimant has a 100% wage loss, except for the week she was paid wages in April 2010.

The parties stipulated claimant earned \$373.50 per week and her fringe benefits were \$95 per week on the date of her accident. The fringe benefits ceased on January 26, 2010.

Claimant has a work disability of 64.25% (a 100% wage loss averaged with a task loss of 28.5%) as of January 26, 2010. During one week in April 2010 claimant made \$400 (\$10 per hour x 40 hours). The Board will utilize the first full week of April 2010 for that week. As claimant was earning 90% or more of her average weekly wage that week, claimant does not have a wage loss for that week.

Respondent's obligation to pay for emergency room treatment that claimant alleges was necessitated by her injury

Claimant requested respondent pay a medical bill in the amount of \$751.18 for a visit to the Anderson County Hospital emergency room in November 2007 because of extreme pain between her shoulder blades. Claimant indicated she went there during the evening because the pain was so severe and she did not think she could wait until the next day to request treatment from an authorized physician. This Board finds this treatment should be authorized due to claimant's severe pain and the fact this was an emergency.

CONCLUSION

1. In addition to the permanent functional impairment claimant sustained to her right shoulder, claimant has met her burden of proving she has a permanent functional impairment to her neck. The Board finds claimant has a permanent functional impairment rating of 12% to the body as a whole for her neck and right shoulder injuries.
2. Claimant has a 64.25% work disability.
3. Claimant is due and owed \$111.39 for unpaid unauthorized medical expenses.
4. Claimant's request for payment of the medical bill in the amount of \$751.18 for Anderson County Hospital emergency room as authorized medical treatment is granted.
5. Future medical treatment will be determined upon proper application.

AWARD

WHEREFORE, the Board modifies the December 20, 2010, Award entered by ALJ Hursh.

Donna K. Thompson is granted compensation from Hasty Awards and its insurance carrier for an October 17, 2006, accident and the resulting disability.

For the period through January 25, 2010, and based upon an average weekly wage of \$373.50, claimant is entitled to receive 49.80 weeks of permanent partial disability benefits at \$249.01 per week, or \$12,400.70, for a 12% permanent partial disability.

For the period from January 26, 2010, through April 3, 2010, and based upon an average weekly wage of \$468.50, claimant is entitled to receive 9.71 weeks of permanent

partial disability benefits at \$312.35 per week, or \$3,032.92, for a 64.25% permanent partial disability.

For the period from April 4, 2010, through April 10, 2010, claimant is not entitled to receive any disability benefits for her functional impairment or work disability as no benefits remain for the 12% permanent partial disability and claimant was earning 90% or more of her average weekly wage while working for Scott Construction Company.

Commencing April 11, 2010, and based upon an average weekly wage of \$468.50, claimant is entitled to receive 207.13 weeks of permanent partial disability benefits at \$312.35 per week, or \$64,697.06, for a 64.25% permanent partial disability and a total award of \$80,130.68.

As of May 20, 2011, claimant is entitled to receive 49.80 weeks of permanent partial disability compensation at \$249.01 per week in the sum of \$12,400.70, plus 67.57 weeks of permanent partial disability compensation at \$312.35 per week in the sum of \$21,105.49, for a total due and owing of \$33,506.19, which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance of \$46,624.49 shall be paid at \$312.35 per week until paid or until further order of the Director.

The Board adopts the remaining orders set forth in the ALJ's Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of May, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

Claimant initially complained of an injured right shoulder. Three months after she injured her shoulder, claimant voiced a complaint to Dr. Lynch that she had pain from her shoulder into her neck. This is the first time claimant ever complained about her neck. Yet, Dr. Lynch gave claimant restrictions for only her shoulder and an MRI he ordered of claimant's cervical spine was essentially normal. After examining claimant, Dr. Lynch referred claimant to Dr. Arnold, who could not identify a neurosurgical problem in the neck. Finally Dr. Lynch referred claimant to a chiropractic doctor for treatment.

Merely because claimant suffered a neck injury does not mean she has a permanent functional impairment. It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. Some deference should be given to the ALJ in assessing the testimony of the witnesses, the evidence presented and whether claimant proved by a preponderance of the evidence she incurred a permanent functional impairment to the neck. The overwhelming medical evidence points to the fact that claimant has no permanent functional impairment to her neck. It is important to note that Dr. Prostic, claimant's own expert, could not state within a reasonable degree of medical certainty that she suffered a permanent functional impairment to her neck. At best he indicated if she did not get proper treatment or had symptoms after receiving treatment she might have an impairment.

This case is similar to that of *Ray*.²⁸ In that case, Mr. Ray was injured in a work-related accident when a 75-pound piece of equipment fell, striking Mr. Ray's neck and right shoulder. A CT scan showed no evidence of an acute fracture or dislocation of the cervical spine and an MRI revealed normal age-related degenerative changes at C5-6 and C6-7. Despite this, Mr. Ray indicated he had a high level of pain. This Board determined Mr. Ray failed to prove he had a permanent functional impairment that was ratable under the *AMA Guides*. In that case Dr. Estivo found Mr. Ray had a 0% permanent functional impairment rating and Dr. Stein opined that within a reasonable degree of medical probability he was unable to determine whether Mr. Ray had sustained a permanent impairment of function as a result of the work-related injury. Dr. Fluter, Mr. Ray's medical expert, opined Mr. Ray had a 5% rating in accordance with the *AMA Guides*.

To summarize, in this matter the only physician who testified claimant has a permanent impairment to her neck is Dr. Koprivica. In addition, after claimant's accident on October 17, 2006, she returned to work almost immediately performing the same job duties until given restrictions by Dr. Lynch on January 29, 2007. After January 29, 2007, claimant continued to perform repetitive work extensively using her right arm until she was

²⁸ *Ray v. A & A Auto & Truck Salvage, Inc.*, No. 1,041,284, 2010 WL 4963599 (Kan. WCAB Nov. 17, 2010).

discharged in January of 2010. Claimant has failed to meet her burden of proving by a preponderance of the evidence that she is disabled in her neck in a manner which is partial in character and permanent in quality as required by K.S.A. 44-510e.

BOARD MEMBER

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Nathan D. Burghart, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge